

SERVICE DATE – MARCH 30, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 745

STATUS OF AGENCY LIBRARY

Digest:¹ This decision denies a petition requesting a rulemaking and investigation regarding the status of the agency's library.

Decided: March 29, 2018

BACKGROUND

On January 24, 2018, Gordon MacDougall and Thomas McFarland (Petitioners) submitted a petition asking the Board to institute a rulemaking and investigation regarding the status of the agency's library. Petitioners, who are practitioners before the Board, assert various concerns about the library's holdings and its management. On February 13, 2018, letters in support of the petition were submitted by Michael Wolly and John Heffner, also practitioners before the Board. On February 22, 2018, the Western Coal Traffic League submitted a letter in support of the petition.

DISCUSSION AND CONCLUSIONS

Although Petitioners express a number of concerns regarding the Board's management of its library, nothing in their petition provides a justification for a rulemaking or formal investigation. Accordingly, the Board will deny the petition.

I. Status of the Library

The Board's library is currently undergoing several changes, due in part to government-wide initiatives focused on encouraging federal agencies to expand the use of digital records.² At the same time, the General Services Administration has awarded a lease for the Board's future office space that, in line with current federal policy, reduces the size of the Board's office space.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² See, e.g., Managing Gov't Records Directive, Aug. 24, 2012, <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

Although the Board will remain at its current location under the new lease, the Board must reduce its physical footprint, a process that will be ongoing in the months ahead. In anticipation of the reduction in office space, as well as to comply with the government policy to make greater use of digital records, the Board is currently in the process of digitizing many of its library materials. Most significantly, the Board is converting its archive of microfiche, which contains decades worth of old filings and agency decisions, into an electronic format.

The Board is not disposing of substantial library materials. In fact, the agency is scanning materials and preserving them in such a way that will increase access to its collection of materials. In the future, anyone with access to a computer (for example, at a public library) will be able to review the digitized materials. Among the benefits of this initiative is that in the future, members of the public will not need to travel to Washington, D.C., or physically visit the Board's library to access Board library materials. Documents specific to the Interstate Commerce Commission (ICC) or the Board that will not be scanned, including books, will be maintained and the Board will continue to provide a means of review, either by permitting members of the public to access the library, or otherwise sharing the materials through its Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC).

The Board recognizes that, notwithstanding the denial of the petition for rulemaking and investigation, the regulations at 49 C.F.R. § 1001.1 governing publicly available records will likely need to be updated given the plans to expand and modernize access to the Board's records.³ When the Board initiates this reassessment of 49 C.F.R. § 1001.1, it will provide notice in a future decision.

II. Request for Stay of Disposition Authority and Request for Expedited Handling

Petitioners ask the Board to stay implementation of “the STB’s disposition authority as published by the National Archives and Records Administration.” (Pet. 3, citing Records Schedules; Availability & Request for Comments, 82 Fed. Reg. 61,336 (Dec. 27, 2017).) According to Petitioners, unless the Board grants a stay of “the STB’s request to the Archives that authority be given to destroy certain ICC records for the period [1887]-1924,” Petitioners and the public will suffer irreparable injury “in various legal research projects, presently undetermined.” (Pet. 3.) Petitioners request expedited handling of this request for stay. (*Id.*) Similarly, Wolly argues that the agency “should not engage in wholesale destruction of these materials” without taking various steps first. (Wolly Letter 1.) Heffner’s letter also appears to address the same disposition of records, expressing concern that the Board is not retaining “historically significant documents.” (*See* Heffner Letter 1.)

³ Petitioners refer to the regulations at 49 C.F.R. § 1001.1 as the Board’s “library rules.” (Pet. 9.) However, these rules are not “library rules”—they are the Board’s rules governing publicly available records. The specific agency records identified in these rules are either available electronically online or can be viewed “upon reasonable request” during normal business hours (Monday through Friday 8:30 a.m. to 5 p.m.), without regard to the library. *See* 49 C.F.R. § 1001.1(a). Indeed, the regulations do not refer to a “library” at all.

Petitioners mischaracterize, and perhaps misapprehend, the notice issued by the National Archives and Records Administration (NARA). In the summary of that notice, NARA explains that it is addressing “certain Federal agency requests for records disposition authority,” i.e., agency proposals “to destroy records they no longer need to conduct agency business.” Records Schedules, 82 Fed. Reg. 61,336. In the Schedules Pending section of the notice, NARA lists requests for authority to dispose of records, with the identity of the requesting federal agency and any subdivision listed first, followed by a brief description of the records at issue. Id. at 61,337. The 14th numbered paragraph, which is the section addressed by Petitioners, states as follows:

National Archives and Records Administration, Research Services (N2 – 134 – 17 – 1, 1 item, 1 temporary item). Interstate Commerce Commission (I.C.C.) Operating Division Formal Dockets, 1887-1924, other than those covering important or controversial cases containing documentation that supplements the printed decisions. These records were accessioned to the National Archives but lack sufficient historical value to warrant continued preservation.

Records Schedules, 82 Fed. Reg. 61,337. The proposed disposition is thus based on a request by NARA’s Office of Research Services—not a request by the Board—as the records at issue were accessioned to the National Archives by the ICC decades ago. See id.; cf. Pet. 3, 6. Because the proposed disposition authority in question is based on a request from NARA’s Office of Research Services and not “the STB’s disposition authority” or “the STB’s request,” (see Pet. 3, 6), Petitioners’ request for a stay (and their associated request for expedited handling) is not directed to the correct agency and will be denied.⁴

III. Board Expenditures of Funds and Internal Work Distribution

Petitioners express concern that the Board has not hired a new librarian, criticize the Board staff currently working in the library, and oppose any reduction in the library’s holdings or hours of operation. (See Pet. 4-6.) These assertions do not support the relief requested.

The issues raised by practitioners involve matters that are within the agency’s discretion. See 5 U.S.C. § 701(a)(2) (“This chapter applies . . . except to the extent that . . . agency action is committed to agency discretion by law”); 49 U.S.C. § 1301(c)(2) (authority to administer the Board, appoint and supervise employees, distribute Board business among employees, and supervise expenditure of funds); Am. Fed’n of Gov’t Employees v. Donovan, 683 F.2d 511, 515 (D.C. Cir. 1982) (whether an action is “committed to agency discretion” takes into account

⁴ NARA’s notice states, “[y]ou may request additional information about the disposition process at the addresses above.” Records Schedules, 82 Fed. Reg. 61,337. The notice lists the following contact information: Margaret Hawkins, Director, by mail at Records Appraisal and Agency Assistance (ACRA); National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740–6001, by phone at 301–837–1799, or by email at request.schedule@nara.gov. Id. at 61,336.

whether there is law to apply on judicial review, as well as the practical and policy implications of reviewability).⁵

IV. Availability of Various Materials

Petitioners also express concerns about certain materials not being available in paper format in the library—in particular, paper volumes of the Code of Federal Regulations (CFR), Traffic World magazine, and “Advance Bulletin” supplements that were prepared by ICC staff until 1981. (See Pet. 4-5.)

Under 5 U.S.C. § 552(a)(2), there are certain designated materials, such as final opinions and orders in cases, that agencies affirmatively are required to make available for public inspection through means other than publication in the Federal Register. The Board is not required to provide copies of CFR volumes, but nonetheless does keep hard copies of the portions of Title 49 which contain the agency’s regulations dating back to 1938 and currently intends to retain these copies.⁶ The Board is also not required to provide copies of magazines or “Advance Bulletins.” Moreover, none of the other statutory or regulatory provisions cited by Petitioners requires the agency to provide access to the CFR, magazines, or “Advance Bulletins.” (See Pet. 8.) As discussed above, the Board is following government initiatives moving towards electronic media instead of paper, and accordingly, the materials designated for public inspection in Section 552(a)(2) are or will be available online. See 5 U.S.C. § 552(a)(2) (only requiring agencies to make the listed materials available “in an electronic format”); 49 C.F.R. § 1001.1(d) (noting online availability).

Similarly, Petitioners express concern that the Board discontinued its issuance of printed, bound volumes of decisions in 2004. (See Pet. 6-7.) Consistent with Section 552(a)(2), the

⁵ Here, there is no law to apply in evaluating the Board’s distribution of day-to-day work activities and expenditures of funds concerning its library. See, e.g., Int’l Union, UAW v. Donovan, 746 F.2d 855, 862-63 (D.C. Cir. 1984) (agency’s decision whether to expend funds for a particular purpose is committed to agency discretion by law).

⁶ The CFR is a compilation of regulations from all federal agencies, not just the Board, that is published by Office of the Federal Register, National Archives and Records Administration, and distributed in paper and online by the U.S. Government Publishing Office (GPO). The complete CFR is available online from multiple sources, such as the GPO. Petitioners contend that online review of the CFR is “highly unsatisfactory in most instances, since examination of a rule frequently requires reference and consideration of the entire text and scheme for an appropriate analysis and meaning.” (Pet. 5 n.4.) However, “the entire text and scheme” are also available through online sources. Bound volumes of the CFR (including historical volumes) are also available for review at other locations, including, for example, the Library of Congress. See Information for Researchers Using the Library of Congress (Dec. 1, 2016), <http://www.loc.gov/rr/main/infoeas/usgov.html>. Finally, online access to historical volumes of the CFR will be available from the Law Library of Congress, a resource expected to launch in “early 2018.” See Digital Projects of the Law Library, <https://www.loc.gov/law/digital-projects.php>.

Board’s final opinions and orders continue to be made available for public inspection in an electronic format on the Board’s website, as they are served. 49 C.F.R. § 1001.1(b)-(d). In this way, the Board’s decisions are more widely available than they were when the agency incurred the cost of binding some of its decisions in printed volumes, which were offered for purchase.

V. Allegations That Paper Copies Have Been Concealed

Petitioners also allege that Board staff “will on occasion remove public materials from the library” and imply that such actions may be taken as a “tendency” for agency personnel to “withhold public information” or conceal “staff actions” from Board Members or the press. (See Pet. 7-8.) These accusations are unfounded. In the course of their duties, it is perfectly appropriate for Board staff to check out library materials to assist in fulfilling the agency’s mission.⁷

VI. Conclusion

For the reasons stated above, the petition provides no basis for a rulemaking or an investigation. While the transition described above is necessary and will increase the availability of Board materials, the Board will also continue working to assist individual stakeholders in accessing Board records and information to the extent practicable.

It is ordered:

1. The petition for rulemaking and investigation is denied.
2. The request for a stay is denied.
3. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.

⁷ Petitioners also refer to an alleged relocation of magazine personnel from one room to another at the ICC in 1979 (nearly four decades ago). (See Pet. 7-8 & App. 2.) The Board does not find this allegation pertinent to the relief currently sought by Petitioners.